

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

NO. **77-1394**

QUICK PAK, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

**PETITION FOR THE WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

J. P. SCAHILL

414 Walnut Street
Cincinnati, Ohio 45202

Attorney for Quick Pak, Inc.,
Petitioner

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

NO. _____

QUICK PAK, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

**PETITION FOR THE WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

The Petitioner, Quick Pac., Inc. prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit rendered on February 16, 1978.

OPINIONS BELOW

The order of the Court of Appeals as yet unreported appears at Appendix C infra p. 16a. The opinion of the National Labor Relations Board appears at Appendix B and is reported in 223 NLRB No. 171, dated April 27, 1976.

JURISDICTION

The order and judgment of the United States Court of Appeals was entered on February 16, 1978. See Appendix C.

The jurisdiction of the Court is invoked under 28 USC 1254 (1) and Section 10c and f of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED FOR REVIEW

1. Is there a constitutional right to cross examination relative to the credibility of witnesses in N.L.R.B. unfair labor practice hearings.

2. Is anti union animus a necessary element in proving an 8 (a) 3 violation?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

"Nor shall any person . . . be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

PROCEDURAL SUMMARY

The Petitioner herein, Quick Pak, Inc., was charged with alleged violation of Section 8 (a) (1) and (3) of the National Labor Relations Act, as amended. After hearings before an Administrative Law Judge on September 29, 1975, the National Labor Relations Board ordered and found the employer, Quick Pak, Inc. in violation of the act as charged under the above Sections.

The Board applied to the United States Court of Appeals for the Sixth Circuit and on February 16, 1978, the Court ordered that the order of the National Labor Relations Board be enforced.

Although constitutional questions were raised, the Court did not discuss or resolve those issues but found that the decision of the Board was supported by substantial evidence on the record considered as a whole.

STATEMENT OF THE FACTS

Quick Pak, Inc. started business in 1974 as a small contract custom packer for three major companies in the Cincinnati area, Procter and Gamble, Kenner Products and Avon Products. Custom packers such as Quick Pak, Inc. enter into competitive bids for packaging jobs which extend from a period of one week to three months. The quantity of work may vary from day-to-day or week-to-week on the same pack.

The volume of business is dependent solely upon the immediate requirements of the supplier as the custom packer only renders a service and manufactures or produces

nothing. In addition to the volatile requirements which are solely within the province of the supplier of product it naturally follows that the level of employment is subject to erratic day-to-day change. The entire employee force turns over four times a year.

The unstable and volatile employment record is further indicated by the fact that six major lay offs occurred in the two year history of the company.

The Respondent did not create the above employment and layoff record, the requirements of the market place established this situation.

It was charged in the complaint by the National Labor Relations Board that the Respondent laid off or dismissed ten employees in May 1975 because of their union sympathies or activities. First, it is clear from the record that the Respondent had no knowledge or information of any employees being engaged in any protected activity. No witness testified nor is there one scintilla of credible evidence in the record indicating that the Respondent had such knowledge. In addition, an employee, Miss North, a witness called by the General Counsel, stated that Mr. Brown, the employer, never made any statement concerning union activity to anyone in the plant. The record is devoid of any such knowledge by the Respondent or protected activities until June 12, 1975. Mr. Brown, plant manager, stated that he received on that date a letter advising him that the union was organizing the employees.

The virus of inuendo is the sole basis for claiming the Respondent had any knowledge of any union activities in the plant. Further, the Respondent did not dismiss or lay off the ten employees because of any union sentiment or for engaging in protected activities.

It is undisputed that attendance and promptness is a key factor in the performance and operation of the plant.

The ten employees laid off in a sixty-day working period were late or absent 194 times.

A summation of these employees can best be paraphrased by the employer when he testified that all of the above employees have had two or three chances, their work record was getting progressively worse and with a high production plant you can't afford to have such employees. At the time of the layoff, May 29th, "they had the ten worst work records." The practice of not recalling those with bad attendance records has been standard company procedure as is illustrated on Respondent's Exhibit No. 1.

If there was ever a good and just cause for layoff and dismissal this must be the classic case. The record is undisputed by both the employees and Respondent. They were laid off because of their work record and were so informed on May 29th. None of the ten employees even attempted to justify or explain their attendance and work record at that time or at the hearing. Nor is it disputed that they all received prior warnings concerning their conduct.

Janice Weaver, employed by the employer in February 1975, was laid off May 29, 1975, for being late or absent twenty-two times in a three-month period, March through May 1975. Her employment record is summarized as follows:

March 1975, absent 2 times, late 3 times;

April 1975, absent 1 time, late 5 times;

May 1975, absent 2 times, late 9 times.

In an approximate sixty-day working period, she was late or absent 36% of the time. In May alone, she was late or absent 50% of the time, without cause or justification. This same employee along with the other alleged discriminatees, filed a charge and complaint with the Ohio

Civil Rights Commission stating that they were laid off solely because of their sex and race; they have filed a charge and complaint with the U. S. Equal Opportunity Commission stating that they were laid off solely because of their race; and they filed a claim with the Ohio Unemployment stating that they were discharged solely because of lack of work; and they have a charge with the National Labor Relations Board stating they were laid off because of union sympathies.

REASONS FOR GRANTING WRIT OF CERTIORARI

1. PETITIONER WAS DENIED THE CONSTITUTIONAL GUARANTEE OF DUE PROCESS OF LAW.

The General Counsel called Janice Weaver as a former employee as one of their main witnesses to testify in the hearing concerning the alleged unfair labor practice. On cross-examination of this witness, counsel for the employer was refused the right to test the credibility of the witness concerning prior inconsistent statements that she had made to other agencies under oath concerning the reason for her discharge from Quick Pak, Inc.

The record of the proceeding indicates the following:

"MR. SCAHILL: No, but, I want to test the credibility of the Witness on Cross-Examination, Your Honor.

JUDGE GILLIS: I am not going to permit this.

MR. SCAHILL: May I make an offer, for the record.

JUDGE GILLIS: Yes.

MR. SCAHILL: I would like the record to show that this Witness filed an affidavit before the Equal Opportunity Commission, stating that the sole reason she was laid off was because of her race; she filed an affidavit with the Ohio Civil Rights Commission, stating the sole reason she was laid off was because of her race and because of her sex.

I would like the record to show that she has filed a statement and claim with the Ohio Bureau of Workman's Unemployment Commission, stating that the sole reason that she was laid off was because of lack of work.

That's all I have to proffer at this time.

JUDGE GILLIS: Now, you understand that I did not allow your proffer."

Likewise in the presentation of the employer's case, counsel for the employer proffered prior inconsistent sworn statements of the employees. . . . "I would like to proffer Respondents 4 and 5, which are Equal Opportunity Commission Statements, by these employees involved here and the Ohio Civil Rights Commission."

Again the Administrative Law Judge rejected these exhibits which are statements under oath stating that they were dismissed because of their race and because of their sex. None of the sworn statements indicated that they were discharged because of alleged union activities which is the basis of the unfair labor practice.

There have been a number of cases that have held the denial of cross-examination to be prejudicial error. In *Reilly v. Pinkus*, 338 US 269 (1949), the Postmaster General charged the vendors of Kelp-I-Dine with mail fraud and held a hearing to determine if a stopmail order shall be issued against the vendors. At the hearing two doctors testified that the vendor's literature made fake representations about the product and the proposed diet was unsafe

and needed medical supervision. The trial examiner refused to allow cross-examination of these witnesses about statements found in medical dictionaries. The Supreme Court held that this was an undue restriction on the right of cross-examination. Similarly in *Southern Stevedoring Co. v. Voss*, 190 F 2d 275 (5th Cir. 1951), the plaintiff claimed to have been injured under § 23 of the Longshoremen and Harbor Workers Act. At the hearing a separate statement of a doctor concerning plaintiff's condition was admitted into evidence. The Court of Appeals held that the hearing under the Act could not be conducted so as to deny cross-examination and reversed. In *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 360 Fed 569 (5th Cir. 1966), the N.L.R.B. sought to enforce back pay order against employer. Attorney for the employer attempted to cross-examine the witness on what sources of income the employee had since being laid off. The Court of Appeals ruled that the question should have been allowed since it bore on a material issue in the hearing. Denial constituted prejudicial error. In *N.L.R.B. v. Harvey Aluminum*, 335 Fed 749 (9th Cir. 1964), the N.L.R.B. wanted the Court of Appeals to enforce order in unfair labor practice case where the employer allegedly maintained surveillance of the Union. Three witnesses testified to that effect and the company produced seven rebuttal witnesses. During the cross-examination of the Chief Counsel's witnesses the company counsel learned that they had given previous statements to the N.L.R.B., the F.B.I. and the Labor Department but he was denied access to these previous statements by the trial examiner. The Circuit Court held that *Jencks* is applicable to adjudicatory hearings before the NLRB and noted in a footnote that it was a necessary corollary to the right of cross-examination. The Court ruled it was prejudicial error to deny access be-

cause the testimony of the witnesses was unquestionably important. *Jencks v. United States*, 353 US 657, 1 L Ed 2d 1103.

The application of the above mentioned case law to the Quick Pak case indicates that the Administrative Law Judge committed prejudicial error in denying the right of cross-examination to test the credibility of the witnesses, Weaver and North. Their testimony is critical because the NLRB established knowledge of the alleged discriminatees through them.

Refusal to permit cross-examination to impeach the witnesses testifying for the General Counsel constitutes a denial of the basic constitutional right of due process of law. This Court has never specifically ruled upon the question in labor cases such as the one at bar and it is a matter of great public interest that the Court affirm the basic constitutional guarantees of due process in such proceedings.

2. ANTI-UNION ANIMUS IS NECESSARY IN PROVING AN 8 (a) (3) VIOLATION OF THE NATIONAL LABOR RELATIONS ACT AND THAT ELEMENT WAS DISREGARDED BY THE COURT.

In order to establish a violation of § 8 (a) (3) General Counsel had the burden of proving three elements, knowledge, unlawful motivation and effect. As the Court stated in *NLRB v. Kaiser Aluminum & Chemical Corp.*, (9th Cir. 1954) 34 LRRM 2412 at 2414:

"Substantial evidence must have been adduced (1) to show the employer knew the employee was engaging in a protected activity, to show that the em-

employee was discharged because he had engaged in protected activity and (3) to show the discharge had the effect of encouraging or discouraging membership in a labor organization. . . . Unless there is reasonable basis in the record for making of the three essential findings, the employer who is permitted to discharge 'for any reason other than union activity or agitation for collective bargaining with employees' need not justify or excuse his action."

In short, without substantial evidence of knowledge of union activity, discriminatory treatment because of union activity and discouragement of union membership, a violation of § 8 (a) (3) does not arise.

As previously stated, General Counsel in addition to showing that respondent knew the alleged discriminatees were engaged in union activities, also has the burden of proving that each alleged discriminatee was laid off *because* of his or her union activities. *NLRB v. Kaiser Aluminum & Chemical Corp.*, (9th Cir. 1954) 34 LRRM 2412 at 2414.

The Administrative Law Judge did not find that, at the time of the lay-offs, Respondent knew of the *individual* union activities of Charles Brown, Linda Brown, Wanda Evans, Jennifer Jones, Marlene Bolton, Cornelia Beamon and Gloria Beecher. He only found that Respondent had "learned *generally* the identity of most of those involved (in union activity across the street)." (Emphasis added) However, even this broad finding is not supported by substantial evidence.

The erroneous findings of the Board can be best shown by the fact that one of the alleged discriminatees, Carrie White, had not signed a union card, was never at work on the day of alleged union activity, as she was absent from work. How the Company had knowledge of her union

activities when in fact she had never engaged in any, indicates that innuendo or suspicion was the sole basis of the Board's finding.

There are no hard facts to back up the findings of the Board.

Evidence which does no more than create suspicion gives rise to inconsistent inference and is not sufficient to support an order of National Labor Relations Board finding an unfair labor practice. *Schwab Manufacturing Co. v. NLRB*, 297 F. Rep. 2d 864. Also, *NLRB v. Buddies Supermarkets, Inc.*, 481 F. Rep. 2d 714; *Metropolitan Life Ins. Co. v. NLRB*, 371 F. Rep. 573; *NLRB v. O. A. Fuller Super Markets, Inc.*, 374 F. Rep. 2d 197; *NLRB v. Fant Milling Co.*, 308 F. Rep. 2d 230; and *Southwest Latex Corp. v. NLRB*, 426 F. Rep. 2d 50.

There is no evidence whatsoever in this record showing that the Company ever had any anti-union sentiment or engaged in any type of anti-union activity. As stated by the Court in *NLRB v. Buddies Supermarkets, Inc.*, *Supra*. "Absent a showing of anti-union animus by the Company, an employee may be discharged for good reason, bad reason, or no reason at all."

Clearly the Board has disregarded the applicable law in the instant case and the Court of Appeals refused to address itself to this issue.

CONCLUSION

The Court of Appeals has erred in failing to uphold the constitutional guarantee of due process of law. The right of cross-examination in order to test the credibility and impeach an adverse witness is essential and vital in the trial of any cause. Although the matter at bar was conducted before an Administrative Agency, such fundamental rights cannot be subrogated in any tribunal.

Findings and judgments entered by the National Labor Relations Board must do more than create suspicion in order to support an order of the Board finding an unfair labor practice. In the instant case there was no showing of anti-union animus by the Petitioner.

Accordingly, we urge this Court to grant the writ of certiorari as both the lower court and the N.L.R.B. have totally disregarded the fundamentals of due process of law in the trial and hearing of this case. There is nothing more basic in the trial of an issue than the right to cross-examine witnesses and the right to impeach the credibility of witnesses adverse.

This Court cannot and should not permit such constitutional violation in the proceedings of this case.

Respectfully submitted,

J. P. SCAHILL
Attorney for Petitioner
414 Walnut Street
Cincinnati, Ohio 45202
Tel. No. (513) 621-1793

APPENDIX A

JD-9-76
Cincinnati, OH.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 9-CA-9417-1
Case No. R-CA-9417-2

QUICK PAK, INC.

and

CARRIE WHITE, AN INDIVIDUAL

and

JANICE WEAVER, AN INDIVIDUAL

Donald L. Crain, Esq., for the General Counsel.
John P. Scahill, Esq., of Cincinnati, OH,
for the Respondent.

DECISION

Statement of the Case

WELLINGTON A. GILLIS, Administrative Law
Judge: This case was tried before me on September 29,
1975, at Cincinnati, Ohio, and is based upon charges filed

on June 10 and July 23, 1975 by Carrie White and Janice Weaver, individuals, upon a consolidated complaint issued on July 30, 1975, by the General Counsel for the National Labor Relations Board, hereinafter referred to as the Board, against Quick Pak, Inc., hereinafter referred to as the Respondent or the Company, alleging violations of Section 8(a) (1) and (3) and Section 2(6) and (7) of the National Labor Relations Act, as amended (61 Stat. 136), and upon an answer timely filed by the Respondent denying the commission of any unfair labor practices.

All parties were represented by counsel, and were afforded full opportunity to examine and cross-examine witnesses, to introduce evidence pertinent to the issues, and to engage in oral argument. Subsequent to the close of the hearing, timely briefs were submitted by the General Counsel and for the Respondent.

Upon the entire record in this case,¹ and from my observation of the witnesses, and their demeanor on the witness stand, and upon substantial, reliable evidence, "considered along with the consistency and inherent probability of testimony" (*Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474, 496), I make the following:

Findings and Conclusions

I. The Business of the Respondent

Quick Pak, Inc., is an Ohio corporation engaged in the packaging of goods at its Cincinnati, Ohio plant. During the 12-month period immediately preceding the issuance of complaint, the Respondent had an indirect outflow of goods in interstate commerce valued in excess

¹ The date, "May 27," appearing on page 20, line 18, of the transcript is hereby corrected to properly read, "May 29."

of \$50,000, which were sold and shipped to Proctor & Gamble, a nonretail enterprise located within the State of Ohio. Proctor & Gamble, in turn, had an annual direct outflow of goods in interstate commerce valued in excess of \$50,000, which it sold and caused to be shipped directly to points outside the State of Ohio.

The parties admit, and I find, that the Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The parties admit, and I find, that International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

A. The Issue

The sole issue presented by the pleadings is whether, in laying off the following 10 employees on May 29, 1975, the Respondent did so because of their union activities, in violation of Section 8(a) (3) of the Act: Janice Weaver, Pat North, Charles Brown, Linda Brown, Wanda Evans, Jennifer Jones, Marlene Bolton, Cornelia Beamon, Gloria Beecher, and Carrie White.

B. The Facts

The Respondent, a service organization since its incorporation in January 1974, is engaged in the packaging and assembling of products on a job contract basis for major companies such as Procter & Gamble, Avon Products,

and Kenner Products. On May 27, 1975,² Janice Weaver, a machine operator, and 1 of approximately 40 employees then employed, having discussed with a number of the plant employees the possibility of forming a union, called the Union and spoke with Pete MacCagno, Grand Lodge Representative. MacCagno arranged with Weaver to meet with her and the other employees the following Thursday, May 29, at 12 noon in an open park area directly across the street from the plant.

At the appointed time, which was their lunch hour, MacCagno met with some 19 plant employees in the park. The meeting took place close to a shelter house which is approximately 150 feet from the street, and in turn, another 50 feet from the plant entrance. After a number of questions and answers, and after MacCagno advised them that they did not have to sign union cards and that it was lawful for them to have a union in the plant, 19 employees signed union cards. Among the 19 were 9 of the 10 alleged discriminatees.³

As Weaver was under the impression that they needed two more signatures, she, accompanied by Pat North, a line leader, left the park gathering and went into the plant.⁴ In the lunchroom in the rear of the plant Weaver found four employees, all of whom, at Weaver's invitation, signed union cards. In leaving, some 15 feet from the

² All dates hereinafter set forth refer to the year 1975.

³ The tenth alleged discriminatee, Carrie White, was absent from work on May 29, and did not sign a card until May 30.

⁴ Weaver and North each testified that in passing the office of Respondent's general manager, Thomas Brown, they observed Brown looking out of his office window toward the park. Partly because Weaver credited North with first observing this alleged incident and North credited Weaver with the same, and further, because Brown testified that his window is opaque and covered with non-draw drapes, I credit Brown's denial that such occurred.

lunch area, Weaver still accompanied by North, asked two others to sign union cards. Both refused. One, Bonnie Harper, a supervisor, did so on the ground that she was a supervisor. Weaver then took the four cards outside where she met MacCagno and the other employees returning to the plant. They were crossing the street between the park and the plant. At the entrance to the parking lot immediately adjacent to the plant, as Weaver was handing MacCagno the additional four cards, MacCagno observed a man and a woman standing at the loading dock next to the plant entrance. MacCagno asked Weaver who the man was, and was told that he was their boss (Brown), a fact established by the record.

At 3:25 p.m., that same afternoon, Supervisor Harper, who had been in the office with Brown and absent from her usual position on the assembly lines during the preceding couple of hours, went out into the plant and read from a slip of paper the names of 10 employees, directing them to report to Brown's office. Nine of the alleged discriminatees, Carrie White being absent, left their lines and went into the office, where they were told, first by Harper, and then by Brown, that they were being laid off. Weaver asked why, and was told by Brown it was because of lack of work, and then, by Harper, that it was because of their bad work records. Shortly thereafter Harper passed out to each of the nine alleged discriminatees present two checks, one a normal payroll check for the prior workweek, and the other a handwritten personal check signed by Diane Brown, president of the Respondent and wife of Thomas Brown. Carrie White was notified by telephone shortly thereafter that she, too, was laid off. White picked up her check the following day, at which time she also signed a union card.

Analysis and Conclusions

The General Counsel contends very simply that the Respondent became aware of the union organizational effort on the part of its employees at noon on May 29, and moved quickly to quash it by discriminatorily laying off within a few hours the 10 alleged discriminatees herein. The Respondent, in denying the discriminatory allegations, asserts that the 10 employees named in the complaint had the 10 worst employee work records,⁵ and for that reason they were laid off.

The Respondent's defense is predicated almost entirely upon Brown's testimony and the work records of the employees involved. Brown testified that the Company has a high employee turnover, having hired 117 employees during the first 9 months of 1975, and maintaining an average employee complement of but 25 to 30 employees.

He further testified that during the period in question his production was way down for the number of employees then employed (40-45), and for economic reasons he had been considering for about 2 weeks the advisability of cutting down his work force. Brown testified further that because the Company's operations are based upon two production lines with as many as 18 employees on a line, absenteeism and tardiness by one employee can foul up a whole

⁵ The Respondent's counsel at the start of the hearing and in his brief made it clear that "work record" relied upon by the Respondent referred to employee absenteeism and tardiness in reporting, and that proficiency at their job or lack of it was not germane to the issue. Brown hedged on this, however, testifying in reply to whether he also considered work performance in selecting the layoffs that "I did, in my own mind," and "I would say so." As the Respondent's evidence in support of its defense to the Section 8(a)(3) complaint allegations does not substantiate Brown's testimony in this regard, I shall treat the Respondent's position as stated by counsel and argued in his brief.

production line, that for this reason these two factors were most important to the Company's production.

Thus, according to Brown, on May 29, he decided to lay off 10 employees "for lack of work and their work record," and selected these 10 because "they had the 10 worst records." Company records bear out Brown's testimony that the 10 discriminatees did in fact have the worst work records for the 3-month period, March through May. They reveal the following:

| | Absent 5 days | Late 17 days |
|-----------------|---------------|--------------|
| Janice Weaver | " 5 " | " 17 " |
| Carrie White | " 9 " | " 7 " |
| Pat North | " 15 " | " 13 " |
| Charles Brown | " 5 " | " 12 " |
| Linda Brown | " 8 " | " 23 " |
| Wanda Evans | " 9 " | " 12 " |
| Jenniffer Jones | " 9 " | " 12 " |
| Marlene Bolton | " 3 " | " 16 " |
| Cornelia Beamon | " 4 " | " 15 " |
| Gloria Beecher | | |

While the layoff on May 29 reduced the Respondent's employee complement to around 30 or so, the record also reveals that 5 weeks later, on July 9, the Respondent had hired new employees increasing the employee complement once again to 41 employees. Asked on cross-examination to explain this, Brown unconvincingly replied "we were still trying to get organized, I guess," and, in reply to the further question as to a reason, testified "no . . . I don't know . . . I don't remember all those things."

While I have no quarrel with the Respondent's assertion that the 10 alleged discriminatees did in fact have the worst work records in the plant, or that sound business judgment would dictate the advisability of getting rid of

undependable employees, the fact stands out (a) that the Company had acquiesced in this extreme absenteeism and tardiness on the part of so many employees over a period of time without having taken any action, (b) that the decision to lay off "because of lack of work" was not made nor effectuated until the union activities commenced on May 29, and then, within 3 hours of such activities, and finally, (c) that the asserted reason for the layoff, as distinguished from selection, "lack of work" is inconsistent with the fact that at 10 o'clock that same morning, Thursday, May 29, employees on both production lines, which included 9 of the 10 here involved, were told by Supervisor Bonnie Harper that they had to work overtime on Saturday.

Under all of the circumstances, I find that, in fact, Brown became aware of the extensive union activity across the street, that, through personal observation and or that of Supervisor Harper, he learned generally the identity of most of those involved, that almost immediately, in seclusion with Harper, he selected from his "work records" the 10 discriminatees, and proceeded to terminate them. I find that, but for their open union activity on May 29, these employees, plus Carrie White, would not have been laid off on May 29.⁶

Accordingly, I find as alleged that the Respondent discriminatorily terminated the employment on May 29, 1975, of Janice Weaver, Carrie White, Pat North, Charles Brown, Linda Brown, Wanda Evans, Jenniffer Jones, Marlene Bol-

⁶ While White had not taken part in the May 29 union activities and did not sign a union card until the following day, the fact remains that, but for the union activity of the other "poor work record" employees, White, too, would not have been terminated.

ton, Cornelia Beamon and Gloria Beecher, all in violation of Section 8 (a) (3) of the Act.⁷

Upon the basis of the above findings of fact and upon the entire record in this case, I make the following:

Conclusions of Law

1. Quick Pak, Inc., is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.
2. International Association of Machinists and Aerospace Workers, AFL-CIO, is a labor organization within the meaning of Section 2 (5) of the Act.
3. By discriminating in regard to the hire and tenure of employment of Janice Weaver, Pat North, Charles Brown, Linda Brown, Wanda Evans, Jenniffer Jones, Marlene Bolton, Cornelia Beamon, Gloria Beecher, and Carrie White, on May 29, 1975, thereby discouraging membership in and activity on behalf of International Association of Machinists and Aerospace Workers, AFL-CIO, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a) (3) and (1) of the Act.
4. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2 (6) and (7) of the Act.
5. The Respondent did not engage in any independent Section 8 (a) (1) conduct as alleged in the complaint.

⁷ Janice Weaver testified that during her employment interview with Supervisor Geraldine Gentry in mid-February 1975, in reply to her question of Gentry as to whether they had a union, Gentry told her not to mention a union because Mr. Brown would fire her on the spot if she did. I credit Gentry's denial in this regard and find this, the only independent Section 8(a)(1) complaint allegation, to be without merit.

IV. The Effect upon Commerce of the Unfair Labor Practices

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and that it take certain affirmative action which is necessary to effectuate the policies of the Act.

It having been found that the Respondent discriminatorily laid off employees Janice Weaver, Pat North, Charles Brown, Linda Brown, Wanda Evans, Jenniffer Jones, Marlene Bolton, Cornelia Beamon, Gloria Beecher and Carrie White, on May 29, 1975, thereby violating Section 8 (a) (3) and (1) of the Act, it is recommended that the Respondent offer the above-named individuals immediate and full reinstatement to their former jobs, or if their jobs no longer exist, to substantially equivalent positions without prejudice to any rights and privileges to which they are entitled, and make them whole for any loss of pay they may have suffered by reason of the discrimination against them, by making payment to them of a sum of money equal to the amount that they would have earned from the earliest date of the discrimination to the date of the offer of reinstatement, less net earnings during said

period to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and shall include the payment of interest at the rate of 6 percent per annum to be computed in the manner set forth by the Board in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

It is further recommended that the Respondent preserve, and upon request, make available to the Board or its agents for examination and copying, all payroll records and reports, timecards, and all other records necessary to compute the amount of backpay.

As the unlawful discharges of the above-named employees are of such serious nature and strike at the very heart of rights intended to be protected by the Act, it is recommended that a "broad" cease-and-desist order issue requiring that the Respondent cease and desist in any manner from infringing upon employee rights.⁸

Upon the foregoing findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:⁹

⁸ *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F.2d 532, 536-537 (C.A. 4, 1941.)

⁹ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

ORDER

The Respondent, Quick Pak, Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or activity on behalf of the International Association of Machinists and Aerospace Workers, AFL-CIO, or any other labor organization by laying off or refusing to reinstate any of its employees, or in any manner discriminating in regard to the hire or tenure of employment, or any term or condition of employment, in violation of Section 8(a) (3) and (1) of the Act.

(b) In any other manner, interfering with, restraining or coercing its employees in the exercise of their right to self-organization, to form, join, or assist any labor organization, and to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Janice Weaver, Pat North, Charles Brown, Linda Brown, Wanda Evans, Jenniffer Jones, Marlene Bolton, Cornelia Beamon, Gloria Beecher, and Carrie White, immediate and full reinstatement to their former jobs or if their jobs no longer exist, to substantially equivalent positions without prejudice to any rights and privileges to which they are entitled, and make them whole in a manner and in accordance with the method set forth in the second entitled "The Remedy."

(b) Preserve, and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records and reports, timecards, and all other records necessary to compute the amount of backpay due under the terms of this recommended Order.

(c) Post in conspicuous places, at its Cincinnati, Ohio, plant, including all places where notices to employees are customarily posted, copies of the attached notice marked "Appendix."¹⁰ Copies of said notice, on forms provided by the Regional Director for Region 9, shall, after being duly signed by an authorized representative of the Respondent, be posted by it as aforesaid, immediately upon receipt thereof and maintained for at least 60 consecutive days thereafter. Reasonable steps shall be taken by the Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated at Washington, D. C.

/s/ WELLINGTON A. GILLIS
Administrative Law Judge

¹⁰ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

14a

APPENDIX B

223 NLRB No. 171

FPW
D-1134
Cincinnati, Ohio

**UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD**

Case 9-CA-9417-1
Case 9-CA-9417-2

QUICK PAK, INC.

and

CARRIE WHITE, an Individual

and

JANICE WEAVER, an Individual

DECISION AND ORDER

On February 10, 1976, Administrative Law Judge Wellington A. Gillis issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has de-

15a

cided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Quick Pak, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns shall take the action set forth in the Administrative Law Judge's recommended Order.

Dated, Washington, D.C. Apr. 27, 1976.

JOHN H. FANNING, Member
JOHN A. PENELLO, Member
PETER D. WALTHER, Member

**NATIONAL LABOR
RELATIONS BOARD**

(SEAL)

¹ The decision of the Administrative Law Judge is corrected to reflect that Carrie White was absent from work a total of 12 days and late a total of 3 days in March-May 1975 before her layoff on May 29. Similarly, Charles Brown's work record for March-May 1975 is corrected to read, 5 days absent and 13 days late before his May 29 layoff.

APPENDIX C

TO BE PUBLISHED

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

No. 76-2049

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
QUICK PAK, INC.,
Respondent.

ORDER

(Filed February 16, 1978.)

Before PHILLIPS, Chief Judge, and WEICK and KEITH, Circuit Judges.

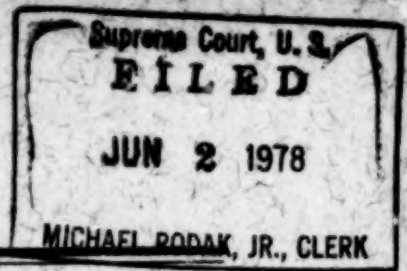
The National Labor Relations Board has applied for enforcement of its decision and order reported at 223 N.L.R.B. No. 171. Reference is made to the reported decision of the Board for a recitation of pertinent facts. Upon consideration of the briefs and oral argument, and the entire record, the court concludes that the decision of the Board is supported by substantial evidence on the record considered as a whole.

Accordingly, it is ORDERED that the order of the Board be and hereby is enforced.

Entered by order of the court.

/s/ JOHN P. HEHMAN,
CLERK

No. 77-1394



In the Supreme Court of the United States

OCTOBER TERM, 1977

QUICK PAK, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD IN OPPOSITION**

**WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.**

**JOHN S. IRVING,
General Counsel,**

**JOHN E. HIGGINS, JR.,
Deputy General Counsel,**

**CARL L. TAYLOR,
Associate General Counsel,**

**NORTON J. COME,
Deputy Associate General Counsel,**

**LINDA SHER,
Assistant General Counsel,**

**DAVID S. FISHBACK,
Attorney,
National Labor Relations Board,
Washington, D.C. 20570.**

In the Supreme Court of the United States

OCTOBER TERM, 1977

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QUICK PAK, INC., PETITIONER

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NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD IN OPPOSITION**

OPINIONS BELOW

The order of the court of appeals (Pet. App. 16a) is reported at 570 F. 2d 649. The decision and order of the National Labor Relations Board (Pet. App. 1a-15a) are reported at 223 NLRB 1080.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1978. The petition for writ of certiorari was filed on March 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner violated Section 8(a)(3) and (1) of the National Labor Relations Act by discharging ten employees because of their union activity.

(1)

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 140, 73 Stat. 525, 29 U.S.C. 158), are:

Section 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

STATEMENT

1. The Board found that petitioner violated Section 8(a)(3) and (1) of the Act by discharging ten of its employees in response to their union activity (Pet. App. 1a-15a). The court of appeals sustained the Board's findings (Pet. App. 16a). The relevant evidence is as follows:

On May 29, 1975, 19 of petitioner's 40 employees met during their lunch hour with Pete MacCagno, a representative of the International Association of Machinists and Aerospace Workers, AFL-CIO, in an open park directly across from petitioner's plant. They discussed the possibility of forming a union at the plant, and all 19 employees present signed union authorization cards. Two of the signers, Janice Weaver and Pat North, then went to the plant lunchroom, where Weaver secured the signatures of four more employees. (Pet. App. 4a.) Weaver and North next unsuccessfully solicited the signature of supervisor Bonnie Harper. They then met

MacCagno and the other employees at the plant parking lot, where Weaver handed MacCagno the four additional cards. At that time, petitioner's general manager Tom Brown was standing at the loading dock next to the plant entrance, about 25 feet from MacCagno (who was wearing an IAM button) and the pro-union employees. (Pet. App. 5a; A. 27.)¹

Shortly after lunch Supervisor Harper went to Brown's office for a meeting. Two hours later Harper returned to her place on the assembly line with a list of ten employees ~~(all of whom had signed union authorization cards)~~, whom she ordered to report to Brown. Nine (all of whom had signed union authorization cards) did so.² Brown then told the nine that they were laid off immediately for lack of work; Harper, however, stated the layoffs were due to the employees' poor work records. The nine were then given their normal payroll checks for the preceding week, plus personal checks signed by petitioner's president, Diane Brown, wife of the general manager. (Pet. App. 5a.)

The Board, adopting the decision of the administrative law judge, concluded that general manager Brown "became aware of the extensive union activity across the street, that, through personal observation or that of Supervisor Harper, he learned generally the identity of most of those involved [and], that almost immediately, in seclusion with Harper, he selected from his 'work records' the ten discriminatees, and proceeded to terminate them * * *. [B]ut for their open union activity on May 29, these employees, plus Carrie White, would not have been laid

¹"A." refers to the Appendix to the briefs of the parties in the court of appeals.

²The tenth, Carrie White, was absent from work that day (Pet. App. 5a).

off on May 29" (Pet. App. 8a).³ The Board rejected petitioner's argument that legitimate business considerations prompted the layoffs, noting that, while the ten did have poor records, (a) their absenteeism and tardiness had been tolerated for a long time without adverse action; (b) the decision to lay off was not made until after the union activities began, and was then enforced within three hours; and (c) that same morning, prior to the union activities, all employees were told they would have to work overtime on Saturday (Pet. App. 7a-8a).

The court of appeals concluded that the Board's decision was "supported by substantial evidence on the record considered as a whole" (Pet. App. 16a).

ARGUMENT

Petitioner contends (Pet. 9-11) that the Board failed to prove that the discharges were motivated by the employees' union activity. That question raises only evidentiary issues which do not warrant review by this Court. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 490-491.

In any event, there is ample support in the record for the Board's findings. The general manager discharged the employees immediately after he observed their union activity. No final payroll checks were ready and personal checks were substituted. Nor does the record support the Company's asserted reasons for the terminations.⁴

³While White had not taken part in the May 29 union activities and did not sign a union card until the following day, the Board found that, but for the union activities "of the other [nine] employees, White, too, would not have been terminated" (Pet. App. 8a, n. 6).

⁴The general manager claimed that the layoffs were occasioned by a lack of work, even though on the morning of the discharge employees were told they would have to work overtime that Saturday. Their

Petitioner further contends (Pet. 6-9) that the Administrative Law Judge denied it due process when he denied its request to "test the credibility" of employee Weaver by cross-examining her on documents she filed with federal and state equal employment agencies and the state unemployment commission. There is no merit to that contention. Contrary to petitioner's assertion (Pet. 7), it is irrelevant that Weaver's statements to other government agencies did not mention union activities as the basis for discharge.

The general manager had told the employees they were being laid off for lack of work, and Weaver stated as much to the unemployment commission. Moreover, when Weaver filed charges with the equal employment agencies she may have believed that she had been discriminated against for reasons other than, or in addition to, union activities. As this Court recently observed, "[n]o matter how honest one's belief that he has been the victim of discrimination * * * the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial." *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, No. 76-1383,

supervisor claimed the discriminatees were laid off for poor work records. At the Board hearing, the Company suggested "poor work records" meant absenteeism and tardiness (Pet. App. 6a n.5). The Company failed to show, however, that absenteeism and tardiness had ever been a significant factor in the employees' evaluations. To the contrary, the record showed that several employees with poor attendance records received promotions, pay raises, and compliments. In the three-month period from March to May, one discriminatee, Janice Weaver, was absent five times and tardy 17 times; nevertheless, in April, she received a pay raise (A. 31), was praised by her supervisor for being "the fastest machine operator in the plant" (A. 39), and was never reprimanded or warned about her attendance record (A. 52). Two other discriminatees, Pat North and Wanda Evans, had recently been promoted to "line leaders" (A. 54, 62, 73, 124-125).

decided January 23, 1978 slip op. 9. In these circumstances, the ALJ's restriction of cross-examination did not deny petitioner due process. Moreover, the Board did not base its findings on the employees' subjective view of the Company's motivation, but on its assessment of the Company's motivation based on the circumstances surrounding the discharges.

To the extent that petitioner was attempting to attack Weaver's general credibility, it was not prejudiced by the judge's ruling in any event. The judge did discredit portions of Weaver's testimony (Pet. App. 4a, n. 4; 9a, n. 7). He accepted her testimony only insofar as it was corroborated by MacCagno (A. 21-29) or concerned incidents involving Harper which Harper either corroborated (A. 49, 134-135) or did not deny (A. 38, 43-45). A trier of fact need not believe all of a witness's testimony before he may believe any of it. *National Labor Relations Board v. Universal Camera Corp.*, 179 F. 2d 749, 754 (C.A. 2), vacated and remanded on other grounds. 340 U.S. 474.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

NORTON J. COME,
Deputy Associate General Counsel,

LINDA SHER,
Assistant General Counsel,

DAVID S. FISHBACK,
Attorney,
National Labor Relations Board.

MAY 1978.